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FILED
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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 709

STEWART-JORDAN DISTRIBUTING COMPANY, INC.,

Petitioner,

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Statutes Involved.

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910, 29 U. S. C., Supp. V, 201 et seq.:

Sec. 6(a)(1) 3, 17

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Sec. 202 12

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JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Stewart-Jordan Distributing Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 29, 1954 (R. 148).

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court (R. 109-116) are not reported in the Federal Supplement. Two opinions are found in the Court of Appeals, Chief Judge Hutcheson dissenting. The majority opinion of two judges (R. 131-138) and the dissenting opinion of Chief Judge Hutcheson (R. 138-147) are re-

ported in 210 F. 2d at 427 and 432, respectively. Nine printed copies of the record having been furnished, reference is made to the pages of the record in which the District Court's findings and conclusions and the opinions of the Court of Appeals may be found, instead of including them in the Appendix.

JURISDICTION.

Th judgment of the Court of Appeals (R. 148) was entered on January 29, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

Whether if—

An employee works as a helper on a local wholesale delivery truck, from which goods are sold and delivered to retailers within the state. These goods, received from outside the state, previously had come to rest in the wholesaler's warehouse and had become a part of the mass of property in the state. Incident to such sales and his delivery of the goods from the truck to the retailers, the helper picks up from the retailers and loads into the delivery truck empty containers of the returnable type. At the end of the day he unloads them at the wholesale warehouse of his employer. The employer there collects these empties and others similarly picked up by other helpers and inspects, replaces unsuitable ones, inventories and stores them and, though not required to do so, later ships the empty containers outside the state. The helpers have no part in this collection, inspection, inventorying, storing or shipping.

1. Are these helpers subject to the Fair Labor Standards Act as "engaged in commerce", *i. e.*, interstate commerce?

2. When does a journey in interstate commerce begin?

3. Is the law as to when interstate commerce commences still the same as that first laid down in *Coe* v. *Errol*, 116 U. S. 517, and followed by this Court in all subsequent cases?

4. Are these helpers engaged in a local business such as Congress, in enacting the Fair Labor Standards Act, intended to leave to the protection of the states?

STATUTE INVOLVED.

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended, are Section 6(a)(1) (minimum wage), Section 11(c) (records), and Sections 15(a)(2) and 15(a)(5) (prohibiting violations of Sections 6 and 11, respectively) and are set forth in the Appendix, *infra*, pp. 17, 18.

STATEMENT.

Respondent, Secretary of Labor, brought suit to enjoin petitioner, Stewart-Jordan Distributing Company, Inc., from allegedly violating, as to helpers employed on local delivery trucks, the minimum wage and record keeping provisions of the Fair Labor Standard Act of 1938, as amended (29 U. S. C. Supp. 206, 211(c); Sections 6(a)(1) and 11(c), *infra*, p. 17; R. 1-5, 109). Petitioner was in compliance as to all the other employees claimed to be subject to the Act[1] (R. 32, 37, 109).

Whether the Act applies to the helpers depends on whether they are "engaged in commerce," respondent admitting that the helpers are not "engaged in production of good for commerce" (210 F. 2d 427, 430; R. 135; 29 U. S. C. Supp. 206).

1. The allegations in the complaint as to violations of the child labor provisions of the Act were stricken by respondent Secretary of Labor before trial (R.109).

Petitioner is a wholesale distributor of beer, ale and wine to the local retailer trade in Florida within the vicinity of Jacksonville (R. 17, 110). These commodities are obtained from manufacturers in other states by rail in carload lots (R. 17, 93, 110) and are unloaded by warehousemen from the railroad car into petitioner's warehouse (R. 45). Later, from the stock in the warehouse, the beer, ale and wine are loaded into local retail delivery trucks, from which driver salesmen sell and deliver such merchandise to local retail customers[2] (R. 19; Finding 4, R. 110) in competition with other wholesalers of the same kind of products. Each of the helpers, the employees here involved, is employed to assist a driver salesman on a delivery truck in connection with these sales and deliveries (R. 48, 75, 82; Finding 5, R. 111).

It is not disputed that the beer, ale and wine come to rest in petitioner's warehouse under no pre-existing order or identification for any particular customer and become a part of the mass of property within the state or that the sale and delivery thereof to retailers is purely intrastate commerce (Dissenting opinion, R. 141, 142, 143; 210 F. 2d 427 at 435, 436).

Beer and ale come in three types of containers, *i. e.*, cans, non-returnable bottles and returnable bottles (R. 17-18, 110). Wine bottles are not returnable (R. 60). Of the beer and ale received and sold, approximately 82% is in non-returnable containers—cans or non-returnable bottles—and only 18% is in returnable bottles[3] In purchasing

2. On one (R. 20) of the seven routes of driver salesmen (R. 36), on one or at the most three occasions a month, the Atlantic Coast Line Railroad Company, Seaboard Airline Railroad Company and Pullman Company may specially order some beer (R. 120). This involves only one route and only one driver salesman and one helper.

3. An average of four cars per month of returnable bottles are received to an average total of 22 cars of all beer and ale (R. 93, 103). Counting wine, which is in non-returnable bottles, the percentage of returnable containers to the total of all con-

the beer and ale, petitioner also purchases the returnable bottles (R. 18, 94), which the breweries agree to repurchase if the petitioner chooses to sell and ship them to the breweries (R. 94). The petitioner is not required to do so and may dispose of them as it sees fit (R. 94).

Incident to and as part of the sale and delivery of beer, ale and wine, the helpers pick up empty returnable containers from local retailers, inspect them to some extent on the retailer's premises and, on returning to petitioner's warehouse at the end of the day, unload the empties from the retail delivery trucks and place them just inside the warehouse door (R. 97, 49, 56, 75).

In the warehouse petitioner gathers together empties similarly picked up from all parts of the area which it serves. There they are inspected. Broken or chipped bottles, non-returnable bottles, coca cola bottles and other unsuitable bottles are removed, placed in separate cases and replaced with suitable returnable bottles. A check is also made for accuracy as to the number returned. They are then moved to the rear of the warehouse and stored. Though not required to do so, petitioner later ships the empty containers to a brewery outside the state (R. 48, 62, 63, 67, 97). All this work in the warehouse, including the loading of railroad cars, is performed by warehousemen and the helpers do none of it (R. 48, 62, 67, 97).

The empties shipped to a brewery outside the state amount to an average of three or four carloads a month, as compared with the receipt of an average of 22 cars a month of beer and ale in both returnable and non-returnable containers and the receipt of as much as 36 carloads a month (R. 93).

The District Court concluded that the interstate journey

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tainers would be less. Dollar wise the cost of returnable containers is approximately $6,200.00 per month, as compared with total monthly purchases of beer and ale alone of approximately $132,000.00 (R. 95).

of the empties outside the State of Florida commenced when they were picked up at the retailer's place of business by the helpers and therefore the helpers were engaged in interstate commerce and were covered by the Fair Labor Standards Act (Conclusions of Law 2, 3 and 4, R. 115). The Trial Court by its judgment (Appendix, *infra*, p. 18; R. 116-118) enjoined petitioner from violating the minimum wage and record keeping provisions of the Act.

On appeal the Court of Appeals for the Fifth Circuit in a two to one decision affirmed the judgment of the District Court, Chief Judge Hutcheson dissenting (R. 148). The judgment is also set forth in the Appendix, *infra*, p. 20. The majority concluded that the interstate journey of the empties to the brewery outside the state commenced when they were picked up from the retailer and therefore the helpers were "engaged in commerce" and subject to the Act (R. 136; 210 F. 2d 427, 431). Chief Judge Hutcheson dissented on the grounds that (1) the interstate journey of the empties did not commence until they were loaded from the warehouse into the railroad car for shipment to the brewery outside the state and (2) the helpers are part of local business activities such as Congress, in enacting the Fair Labor Standards Act, intended to leave to the protection of the states (R. 138-147; 210 F. 2d 427, 432-436).

In the petition for writ of certiorari, petitioner accepts the findings and conclusions of the District Court and Court of Appeals that the helpers are its employees, but contends that these helpers are not subject to the Fair Labor Standards Act.

JURISDICTION OF THE DISTRICT COURT.

The District Court had jurisdiction of this case under Section 17 of the Fair Labor Standards Act (29 U. S. C. 217), which is set forth in the Appendix, *infra*, p. 18.

REASONS FOR GRANTING WRIT.

I.

This Petition Presents to This Court for the First Time the Question of When Interstate Commerce Commences for the Purpose of Determining Coverage Under the Fair Labor Standards Act.

This Court has determined when interstate commerce ends, within the meaning of the phrase "engaged in commerce" as used in the Fair Labor Standards Act. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. But this Court has never ruled or been called upon to rule as to when, under the Act, interstate commerce begins.

Prior to this Court's decision in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, the Wage and Hour Administrator's enforcement policy was that the established concepts of when interstate commerce ended no longer existed and, although goods received from outside the state came to rest in the wholesaler's warehouse under no pre-existing order and for no customer's particular use, that this did not terminate the interstate journey but that it continued at least until the goods had been sold and delivered to a retailer and possibly even until they reached the consumer. In the Jacksonville Paper Co. case this Court denied and put an end to that contention in re-affirming the established principles and concepts as to when the interstate journey of goods from outside the state ends in the wholesaler's warehouse and under what circumstances it does not end at that point.

Now the Administrator seeks to establish for the Fair Labor Standards Act new principles for determining when

an interstate journey commences. For the same reason that this Court granted certiorari in the Jacksonville Paper Co. case and set at rest doubts created by the Wage and Hour Administrator as to when interstate commerce ends under the Act, so this Court should grant certiorari in this case to place at rest doubts created by the Wage and Hour Administrator and by the decision of the Court of Appeals as to when interstate commerce begins.

II.

The Decision of the Court of Appeals Is in Direct Conflict With the Decisions of This Court on the Important Question as to When Interstate Commerce Commences.

The two majority Judges of the Court of Appeals based their decision (210 F. 2d 427, 431; R. 136) on the holding in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, that once goods are in interstate commerce, as in the case of goods procured from without the state, "if the halt in the movement of the goods is a convenient, intermediate step in the process of getting them to their final destination, they remain 'in commerce' until they reach these points," *i. e.*, the customers.

If, as Chief Judge Hutcheson states in his dissenting opinion (210 F. 2d 427, 436; R. 142), the cases of empty returnable bottles "were already in the stream of commerce," we would "agree that the temporary unloading and depositing of the empties at the warehouse did not divert them from that stream." But in the instant case this begs the question, which is whether the cases of empty returnable bottles entered interstate commerce when they were picked up at the retailer's place of business or when they were loaded into a railroad car for shipment outside the state. As held in *Coe* v. *Errol*, 116 U. S. 517, and the

subsequent decisions of this Court, the question of when interstate commerce commences "does not present the predicament of goods in course of transportation through a state, although detained for a time within the state * * *."

The majority of the Court of Appeals, in disregard of and without referring to *Coe v. Errol*, 116 U. S. 517, and the subsequent cases of this Court as to when the interstate journey commences, concluded that since, when the empties were picked up by petitioner's drivers and helpers, the intended destination was beyond the warehouse and outside the state, the helpers were engaged in interstate commerce.

As stated by Chief Judge Hutcheson in his dissenting opinion (210 F. 2d 427, 436; R. 144) in *Coe* v. *Errol*, 116 U. S. 517, and "in all cases decided since which deal with the question when does the interstate journey commence, the courts have held without wavering that the interstate journey of goods does not commence until they have started upon such transportation in a continuous route or journey to another state or have been committed to a common carrier for transportation to another state. The transportation of goods to a depot or other place where the journey is to begin is not a part of the journey but is only preliminary and is performed for the purpose of putting the property in a state of preparation and readiness for transportation. The intention to ship the goods outside the state and partial preparation to do so are of no consequence." As stated in *Coe* v. *Errol*, 116 U. S. 517:

> "Although intended for exportation they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place outside of the state or committed to the custody of the carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? * * * The

carrying of them in cars or other vehicles * * * to the depot where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation."

In this case the returnable empties are picked up throughout the entire area served by petitioner and transported to its warehouse as the central point for assembly and preparation for the shipment outside the state. There these empties are carefully inspected and improper, broken or chipped bottles are replaced with bottles of the right kind and in good condition. They are inventoried and are not shipped until a sufficient quantity has been so collected.

These principles of *Coe* v. *Errol*, for determining when transportation in interstate commerce commences, have been followed by this Court ever since without wavering and have also been applied in determining when foreign commerce commences. *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21; *Southern Pacific Co.* v. *State of Arizona*, 249 U. S. 472, 477; *Empresa Siderurgica S. A.* v. *County of Merced, California* (1949), 337 U. S. 154; *Richfield Oil Co.* v. *State Board of Equalization* (1946), 329 U. S. 69; *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36; *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40.

The last two cases cited are of particular import as they arose under the Federal Employers' Liability Act, coverage under that Act being based on "engaging in commerce between any of the several states or territories * * * or any of the states or territories and any foreign nation or nations" (45 U. S. C. 51). As stated by this Court in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 131:

"* * * Both (Fair Labor Standards Act and Federal Employers' Liability Act) are aimed at protecting commerce from injury through adjustment of the master-servant relationship * * * We see no persuasive

reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen* and related cases (under Federal Employers' Liability Act) should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

The holdings in these two cases under the Federal Employers' Liability Act are set out below on this page under reason III.

III.

If the Decision of the Court of Appeals Is Not Reviewed by This Court, It Will Leave in Effect One Rule as to When Interstate Commerce Commences for the Purpose of Determining Coverage Under the Fair Labor Standards Act and Another and Conflicting Rule for Determining the Same Question Under Other Important Federal Acts, Coverage Under Which Is Based Upon the Person or Activity Being in Interstate Commerce.

Coverage under the Federal Employers' Liability Act is based on "engaging in commerce between any of the several states or territories * * * or any of the states and territories and foreign nation or nations" (45 U. S. C. 51). Under that Act and in *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36 and *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40, in reliance on *Coe* v. *Errol*, it was held that the movement within the state of logs by a logging company's railroad from various places within its timber land to a central point, from which they were sold and shipped outside the state, was not in interstate commerce and therefore the brakeman on the railroad was not under that act.

The Merchant Marine Act provides that "No merchandise shall be transported by water, or by land and water,

* * * between points in the United States * * * embraced within coast-wise laws * * * in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States * * *" (46 U. S. C. 883). In 1953 the Court of Appeals for the Seventh Circuit relied on *Coe* v. *Errol*, 116 U. S. 517, in holding that a Canadian tug, in pulling or pushing logs into a towing boom so that they could be towed coast-wise from Minnesota to Wisconsin by an American vessel, was not engaged in "transportation for interstate commerce" but "was merely forming a bundle or package of logs to be carried on an interstate journey," which journey could not begin until the logs were in the towing boom. *United States* v. *1500 Cords, etc.*, 204 F. 2d 760, 763-764.

Although apparently the specific question of when interstate commerce begins has not yet arisen under the Motor Carrier Act, as no reported decisions have been found, this question will arise under that Act as it applies "to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce * * *" (49 U. S. C. 302).

IV.

The Question of When Interstate Commerce Commences for the Purpose of the Fair Labor Standards Act Is One of Wide Application and Import.

Not only the thousands of wholesalers of malt beverages throughout the forty-eight states, District of Columbia and territories but other wholesalers as well are vitally interested in the question of when interstate commerce commences for the purpose of determining coverage under the Act. So are other employers, who not only return but also in the original instance ship goods in interstate commerce.

The answer to the question of when under the Act interstate commerce begins applies to many situations besides transportation of goods. Equally important in these other situations is the answer as to whether the previously established principles for determining this question are applicable or whether a new set of principles apply under the Fair Labor Standards Act. As just one example, whether the pick-up from sender and the carrying by messenger boy to the telegraph office of messages for a person in another state constitutes being "engaged in commerce" was not passed on in *Lenroot* v. *Western Union Telegraph Co.*, 323 U. S. 490.

V.

The Helpers on the Local Delivery Trucks Are Engaged in a Local Business Which Congress, in Enacting the Fair Labor Standards Act, Intended to Leave to the Protection of the States. In This Regard the Decision of the Court of Appeals Conflicts With the Decisions of This Court.

Congress, in enacting the Fair Labor Standards Act, plainly indicated its purpose to leave local business to the protection of the states. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570; *10 East 40th Building, Inc.* v. *Callus*, 325 U. S. 578. In the Jacksonville Paper Co. case this Court held as not covered by the Act those employees whose duties concerned only distribution after the interstate journey of the goods from outside the state had terminated at wholesaler's warehouse. The only difference between those employees and the helpers of petitioner is that in the Jacksonville Paper Co. opinion there is no mention as to whether the delivery employees also picked up and returned to the wholesaler's warehouse goods which the employer later shipped outside the state.

Does that difference affect the local business nature of petitioner's local distribution or of the helpers' essentially local activities? We think not.

The important and principal activity and the purpose of petitioner's business is to sell and distribute. That sale is to local retail customers. As incident to and in order to make the sale, it is necessary to take the empty containers off the hands of the retail customer. Therefore, as part of their sale and distribution duties and incidental thereto, the driver salesman and helpers pick up the empties from retailer's place of business (R. 19). In bringing the empties back to the warehouse on the delivery trucks, along with the unsold full containers, the helpers are doing nothing more than they would be doing if they had not picked up the empties. The volume of empties picked up, as compared with the full containers delivered, is very small—only 18% of beer and ale being sold in returnable bottles (R. 93, 95, 100).

Furthermore, there is a distinct separation between the helper's duties in returning empties to the warehouse, after which the helpers have nothing to do with the empties, and the subsequent handling of the empties in the warehouses and the shipment of them to a brewery outside the state. The duties and activities of the helper are purely intrastate and local in nature and separated from the preparation of empties for and the shipment of them outside the state. In common understanding and conception their activities are purely local. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 230-232; *10 East 40th Building, Inc.* v. *Callus*, 325 U. S. 578, 582-583.

After quoting from this Court's statement in the Jacksonville Paper Co. case that "Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states," Chief Judge Hutcheson

stated in his dissenting opinion (21 F. 2d 427, 433, 436; R. 140-142):

> "Applying these principles to this case * * * it seems perfectly clear to me that it is to completely misapprehend either the effect of the undisputed facts or of the meaning and effect of the opinion in the Jacksonville case or of both to held, as the majority does, that the appellant's employees involved in this case, in the course of their purely intrastate solicitation, sale and delivery of beer, pick up some of the empties for return to the warehouse and because the warehouse, after assorting and assembling enough of them to make a carload, ships them in interstate commerce, these employees are engaged in commerce.
>
> "In the first place, this holding, that the picking up of a small part of the empties for return to the warehouse brings these men, whose activities are essentially intrastate, into interstate commerce, makes the tail (and a very little tail at that attached to a very large dog) wag the dog."

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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April 23, 1954.